Normala had in the meanwhile contracted another marriage with Osman bin Omar with the blessing of her parents. She is now living apparently with her husband and is in the family way. In fact her second marriage to Osman bin Omar is waiting to be registered.

In view of what I have said, it cannot be truly ascertained that both the respondents have not performed their duty as 'an imperative ministerial character involving no judgment or discretion on their part'. Besides three conditions required under s 44 as well as s 45 of the Specific Relief Act 1950 have not been complied with in the sense that the enforcement of the right has been denied to the applicant. If at all in this case the respondents had not made the right decision, the applicant should have appealed to the Court of Appeal under s 108 of the Islamic Family Enactment. But in reality the respondents have yet to hear the applicant's application for the registration of his marriage to the girl Normala bte Jusoh. The case is in fact pending. Under such circumstances it is even doubtful whether there is any right of appeal for him to the Court of Appeal under that section. Unfortunately for the applicant, the turn of events, ie Normala's repudiation of her marriage to the applicant and divorce and her subsequent marriage to Osman bin Omar by whom she is now in the family way, had frustrated his dire effort to be with her as his lawfully wedded wife. What made matters worse, it seems that this case does not fall within the jurisdiction of the High Court to issue an order of mandamus because the parties are Muslims and it involves the personal law of Muslims under the Kedah State Constitution as well as the Federal Constitution as clarified by Tun Suffian in his *Introduction to the Constitution of Malaysia*.

Taking all these into consideration I am of the view that this is not a fit case which would warrant the High Court to interfere by way of compelling both respondents to act to register the applicant's marriage to Normala bte Jusoh. Even if I were to do so and issue an order of mandamus to compel the respondents to register the marriage, it would only be a case of an academic and judicial exercise because there is no more foreign marriage between the applicant and Normala as such to be registered since, it may be recalled, the marriage had been dissolved by way of repudiation of one talak at the instance of Normala bte Jusoh who has since remarried Osman bin Omar, and by whom she is in the family way. What good will it do to insist on registering a non-subsisting marriage.

Accordingly, I dismissed the applicant's application for an order of mandamus with costs.

Application dismissed.

Solicitors: *Ahmad Farid & Co.*

Reported by *Prof Ahmad Ibrahim*

Public Prosecutor v Lee Ah Ha

HIGH COURT (IPOH) – PERAK CRIMINAL TRIAL NO 18 OF 1984
ABDUL MALEK J
17 AND 25 MARCH 1988

Criminal Law – Charges of possession of firearms and ammunition – Proclamation of security area – Judicial notice – Publication of proclamation – Laying down before Parliament – Provision directory and not mandatory – Statement from the dock – Evidence Act 1950, ss 56 & 57 – Criminal Procedure Code (FMS Cap 6), s 173(k) – Internal Security Act 1960 (FMS Cap 6), ss 47, 80 & 81

Constitutional Law – Whether proclamation of security area had been laid before Houses of Parliament – Provision directory and not mandatory

In this case the accused had been charged with two charges for possession of firearms and ammunition at Ipoh which was a security area by virtue of PU(A) 148/69. The evidence showed that the firearms and ammunition were found in a plastic bag and purse under the driver's seat of the car belonging to and driven by the accused. The court held that a prima facie case had been established and called on the accused for his defence. The accused elected to make a written statement from the dock.

Held, convicting the accused:

(1) The court has to take judicial notice of all laws and regulations and therefore the proclamation need not be proved in view of s 56 of the Evidence Act 1950;

(2) In regard to the sanction of the Public Prosecutor the crucial factor is the offence itself and not so much the exact details which must be the same as the charges. Although the time and place mentioned in the sanction and in the charges are different, the offence in this case was a continuous one and there was no reason to amend the charges as regards the time and place.

(3) The date of the proclamation was wrongly given in the charge and the court found it necessary to amend the charges as regards the date of the proclamation. It is not, however, strictly necessary to quote the notification references in the charges and therefore the amendment to the charges was purely procedural.

(4) The provision for the laying down of the proclamation before the Houses of Parliament is merely directory and not mandatory and the relevant proclamation is therefore valid without the need to ascertain whether it had been so laid.

(5) The court having earlier found that the prosecution had established a prima facie case against the accused, on the basis of the accused's prepared statement, the court was of opinion that his mere denial through this statement from the dock had not raised any doubt on the prosecution's case. The accused was therefore convicted on the two charges as amended as regards the date of the proclamation.

[*Editorial Note*: The accused has appealed to the Supreme Court vide Criminal Appeal No 19 of 1988.]

Cases referred to

1 *Johnson Tan Han Seng* v *PP* [1977] 2 MLJ 66 (refd)
2 *PP* v *Sihabduin bin Haji Salleh & Anor* [1980] 2 MLJ 273 (refd)
3 *Lee Kim Hoong* v *Inspector General of Police* [1979] 2 MLJ 91 (refd)

4 *Inspector-General of Police* v *Lee Kim Hoong* [1979] 2 MLJ 291 (refd)
5 *Lim Woon Chong & Anor* v *PP* [1979] 2 MLJ 264 (refd)
6 *Jan Mohamed Noor Mohamed Bagban* v *State of Gujarat* [1966] 1 SCR 385; AIR 1966 SC 385 (refd)
7 *Krishnan Khanna* v *State of Punjab* AIR 1962 Punj 32 (refd)
8 *Dignan* v *Australian Steamships Proprietary Ltd* (1931) 45 CLR 188 (refd)

Legislation referred to
Criminal Procedure Code (FMS Cap 6) s 173(k)
Essential (Security Cases) Regulations 1975 r 13
Evidence Act 1950 ss 56 & 57
Internal Security Act 1960 (Revised 1972) ss 47, 57, 80 & 81

Mohd Zaki bin Mohd Yasin (Deputy Public Prosecutor) for the Public Prosecutor.
Paramjit Singh Gill for the accused.

Cur Adv Vult

Abdul Malek J: The accused had been charged for possession of three firearms and 48 rounds of ammunition at about 12.30 pm on 17 August 1984 at Jalan Ali Pitchay, Ipoh, which is within a security area by virtue of PU(A) 148/69.

The charges preferred against the accused read as follows:

First charge

That you on 17 August 1984 at about 12.30 pm at Jalan Ali Pitchay, Ipoh, in the district of Kinta, in the State of Perak, being a security area as proclaimed by the Yang di-Pertuan Agong vide PU(A) 148 dated 15 March 1969, without lawful excuse, did have under your control three firearms, to wit, Smith and Wesson .38 Special serial no J 602790, a revolver .22 and a Llama E Special serial no 18554 without lawful authority and that you have thereby committed an offence punishable under s 57(1)(a) of the Internal Security Act No 82 (Revised 1972).

Second charge

That you on the same date, time and place, being a security area as proclaimed by the Yang di-Pertuan Agong vide PU(A) 148 dated 15 March 1969, without lawful excuse, did have under your control 48 rounds of ammunition, to wit, 5 rounds of .38 special bullets and 43 rounds of .22 bullets without lawful authority and that you have thereby committed an offence punishable under s 57(1)(b) of the Internal Security Act No 82 (Revised 1972).

The prosecution relied mainly on the evidence of Detective Lance Corporal 55586 Rosli Mohd Zyed (PW1) who told the court that, after receiving information as regards the presence of firearms and ammunition in a particular car, he had kept watch on a BMW 323i car registration no BCB 6096 which was parked in front of Diamond Hotel at Jalan Ali Pitchay, Ipoh. After about ten minutes, he had seen the accused approaching the said car and getting into it.

While the accused was seated in the car, PW1 said he identified himself to the accused who had then tried to start the engine but was prevented from doing so by PW1 who took away the key. According to PW1, the accused had at that stage bent down to retrieve something from below him. PW1 added that the accused was accordingly detained by him and he subsequently took the accused to the Diamond Hotel to telephone for assistance. While waiting for police reinforcements, PW1 said he continued observing the said car, which had been locked after the accused was detained, and did not see anyone else approaching it.

On the arrival of the police party, Inspector Kamaruddin Yusoff (PW2) had driven the car to the police station with the accused sitting in the rear seat flanked by PW1 and DPC 64982 Jamal Hj Harun (PW3). At the police station, PW2 had conducted a search of the car in the presence of his police party and the accused and had recovered the firearms and ammunition in a white plastic bag and green purse beneath the driver's seat. PW2 accordingly lodged a police report to that effect.

I agreed with learned counsel for the accused that this report should be admitted in evidence as although PW1 stated that he had reduced the information received in writing in his diary he was not able to produce the diary. To my mind, PW1's recording of the information in his diary was not the first information report especially since he was not able to produce it and this was agreed to by the investigating officer Inspector Abdul Wahab (PW5). Furthermore, I felt the production of the police report by PW2 was relevant to ascertain whether PW2 had stated in that report as to whether the accused had offered him a $20,000 bribe if PW2 released him as he had told the court in his testimony.

According to PW5, the said car had been returned to the accused through his brother two years after the incident as its condition was deteriorating. The police armourer ASP Ishak Hj Hashim (PW8) testified that the firearms were serviceable although some of the bullets tested had misfired. The assistant director of Jabatan Pengangkutan Jalan, Selangor (PW7) told the court that the said car had been registered in the name of the accused since April 1984.

PW1 in particular impressed me as an honest and truthful witness and I saw no reason to reject his testimony. At the close of the prosecution's case, I was satisfied that the prosecution had established on the evidence presented that the accused was in control of the firearms and ammunition at the relevant time and place on the relevant date and that the firearms and ammunition were serviceable. In view of s 57(1)(a) of the Evidence Act 1950 the court was bound to take judicial notice of all laws and regulations and I therefore held as had been held by the Federal Court in *Johnson Tan Han Seng* v *PP*[1] that the proclamation need not be proved in view of s 56 of that same Act.

Concerning PW2's evidence that the accused had offered him a $20,000 bribe to release him on the way to the police station, the court did not place any weight to his testimony on this point as PW2 saw it fit not to include it in his police report, and because PW3, who was sitting next to the accused, could not recall such a statement and also because PW1, who was also sitting next to the accused at that particular time, was never asked on this. At the same time, however, the court accepted both PW1's and PW2's evidence that the accused did, while in the car on the way to the police station, appeal to be freed.

As regards reg 13 of the Essential (Security Cases) Regulations 1975 which states that 'when the case for the prosecution is closed, the court shall call on the accused to enter his defence', the Federal Court in *PP* v *Sihabduin bin Haji Salleh & Anor*[2] by a 4-1 majority had held that, despite this provision, the court is not obliged to call on the accused to enter on his defence unless the prosecution has proved a prima facie case against him. In this instance, I was of the view that a prima facie case had been so established and called the accused for his defence.

The accused elected to make a statement from the dock and produced a prepared typewritten statement in English signed by him for that purpose. When the statement was interpreted to him, he confirmed it to be correct. I accordingly marked it as an exhibit (D17) pursuant to s 173(k) of the Criminal Procedure Code (FMS Cap 6).

By that written statement, the accused stated that his landlord Peter had introduced Ah Hock and Ah Leong to him about three weeks before the incident and these two men had since visited him regularly. The accused added that Ah Hock had told him that both he and Ah Leong were in bad shape and were looking for contract work.

The accused went on to state that on the day in question, Ah Hock had come to invite him for breakfast. The accused had driven him to Jalan Ali Pitchay for breakfast but on reaching the place Ah Hock had told the accused that he wanted to fetch Ah Leong and had consequently borrowed the accused's car to do so while the accused waited at the stall. This was at about 10.30 am. About an hour later, Ah Hock had returned with Ah Leong and had returned the car key to the accused.

The accused's statement further stated that after breakfast, the accused was walking towards the car with Ah Leong, and Ah Hock was paying for the parking ticket, when the accused was arrested by a police officer. On seeing this, both Ah Hock and Ah Leong had run away.

The accused through this statement denied knowledge of the firearms and ammunition although he admitted that they were recovered from under the driver's seat at the police station. He explained that he used to lend the car to Ah Hock, Ah Leong and his other friends and that his car door lock was faulty and could be opened from the outside. The accused also alleged a frame up by adding that as a successful land broker since 1984 due to his undercutting prices he had made some business enemies.

In effect, however, the accused by his statement admitted that the car BCB 6096 was his, that he was arrested on the day in question just as he was about to enter the car and that the firearms and ammunition were recovered beneath the driver's seat of his car during the search at the police station. The only thing he denied was knowledge of the firearms and ammunition. As regards the presence of the other two men at the scene, PW1 had been specifically questioned on this while giving evidence and he had categorically denied their presence.

It is pertinent at this stage to refer to the legal technicalities as submitted by learned counsel for the accused. The first concerns the sanction. Section 80 of the Internal Security Act 1960 only states that a prosecution for any offence under this Act punishable with imprisonment for a term of seven years or more requires the consent of the Public Prosecutor. The crucial factor is the offence itself and not so much the exact details which must be the same as that in the charges. It is obvious that the offence was continuous from the time the accused was detained at Jalan Ali Pitchay to the time of the search of the car at the police station. The court is of the view that the time and place in the sanction (12.45 pm at the police station) are correct just as the time and place (12.30 pm at Jalan Ali Pitchay) in the charges are correct. In the circumstances, I saw no reason to find the sanction or the charges defective and consequently saw no necessity, despite the learned deputy public prosecutor's suggestion, to amend the charges are regards the time and place.

However, due to the negligent oversight of the prosecution, the date of the proclamation in the charges had been stated as 15 March 1969 when it should have been 15 May 1969 as can be clearly seen from PU(A) 148/69 itself. The court therefore found it necessary to amend the said charges at this stage as regards the date of the proclamation.

On this point, it had been held in *Johnson Tan Han Seng* v *PP*[1] by the then Federal Court that it is not even necessary to quote the notification references in the charges making this amendment to the charges wholly procedural.

Learned counsel for the accused had also argued at length that the notice under ss 47 and 81 of the Internal Security Act 1960, to the persons who the minister thinks ought to have notice thereof, had not been given but with

due respect to counsel, these provisions as regards notice only apply if there has not been any publication of the proclamation in the gazette as stated in sub-s (3) of s 47, and sub-s (1) of s 81, of the said Act.

Learned counsel for the accused also submitted at length regarding the laying before Parliament of PU(A) 148/69. Actually, a similar issue had been raised twice before. The first was in *Lee Kim Hoong* v *Inspector-General of Police & Anor.*[3] In that case, Harun J held, as the deputy public prosecutor had conceded, that the Emergency (Public Order and Prevention of Crime) Ordinance 1969 had not been laid before Parliament as required by art 150(3) of the Federal Constitution and therefore had ceased to have effect. He also held that it was not saved by the Emergency (Essential Powers) Act 1979 which only dealt with Ordinances and Regulations made on or after 20 February 1971. On appeal, the then Federal Court allowed the appeal against that decision having had the benefit of additional evidence in the form of an affidavit sworn by the assistant secretary to Parliament that it had been so laid. The Federal Court also noted in that case the desirability of gazetting the fact that a statutory instrument has been so laid before Parliament. This is of course different from the statement at the footnote of the relevant notification saying that it is going to be so laid in due course.

In *Lim Woon Chong & Anor* v *PP*[5] which was decided about a month earlier, the Federal Court was again assisted by the evidence of the same assistant secretary of Parliament who swore an affidavit in the other appeal, on the objection that the Essential (Security Cases) Regulations 1975 published as PU(A) 320 and 392 of 1975 had not been laid in the Senate and came to the opinion that the Proclamation was in fact laid before the Senate and therefore everything that flowed from it was valid.

In our case we did not have the benefit of any additional evidence as to whether PU(A) 148/69 had been so laid before Parliament. In *Craies on Statute Law*, 7th Ed at pp 317-318, it is stated:

> Statutory rules should not take effect unless they have been made and published as directed by the statute which authorizes them, but it may be a question whether the direction to lay the rules before Parliament is mandatory or merely directory. Is laying a condition precedent to their operation or may it be neglected without prejudice to the effect of the rules? Each case must depend on its own circumstances or the wording of the statute under which the rules are made. For instance in *Dale's* case (1881) 6 QBD 376, rules made under the Public Worship Regulation Act 1874, s 19, were in question and Brett LJ said: 'I am of opinion that the rules and orders have statutory authority, for not only is the authority given to certain persons by statute to draw them up, but it is provided that they shall be laid before Parliament for a certain time, and if not objected to they are then to be binding.' In *Bailey* v *Williamson* (1873) 8 LRQB 118, s 9 of the Parks Regulations Act 1872 provided that any rules made thereunder should be laid before the Houses of Parliament if sitting and if not, within three weeks of the beginning of the next session and if any shall be disapproved by either House within one month of the laying, such rules or parts as have been disapproved shall not be enforced. The Act was passed in June 1872, the rules were made in September 1872, when Parliament was not sitting. In November the prisoner was convicted of contravening the rules. Quain J said that there were no negative words in s 9 and the approval of Parliament was not at all necessary. The legislature must have intended that the rules should come into force as soon as they had been properly made and the power exercised after the passing of the Act under the fourth section and they should continue in force till either House of Parliament had expressed its disapproval of any rule or part of any rule, and then from that time that rule or that particular part of any rule should not be enforced. In *Starey* v *Graham* [1899] 1 QB 406 Channell J said '(it is said) that in order to comply with the provisions of s 101, sub-s (4) of 46 & 47 Vict, c 57, a copy of the rule of 1889 should also have been laid before both Houses of Parliament in order to make them valid. I somewhat doubt whether the provisions of s 101 are more than directory and whether it is necessary in any particular case where reliance is placed on such rules to prove that in fact its provisions had been complied with.'

In *Erskine May's Parliamentary Practice*, 20th Ed, at p 614 he says, 'breach of a statutory duty to lay an instrument before Parliament will not of itself invalidate the instrument. The resulting situation has been dealt with both by statute and by statutory instrument'. In *Jan Mohamed Noor Mohamed Bagban* v *State of Gujarat*[6] it was held that: 'Our conclusion is that the laying requirement enacted in s 21(3) of the Act is merely directory. It logically follows that failure to lay reg 14 has no effect on its validity and it continues to be effective and operative from the date it was made'. Grover J, speaking for the Bench in *Krishnan Khanna* v *State of Punjab*,[7] said that sub-s (6) of s 3 of the Essential Commodities Act 1955 as regards the laying was merely of a directory nature and its non-compliance did not render the Punjab Coal Control Order 1955 invalid or void. In *Dignan* v *Australian Steamships Proprietary Ltd*[8] it was held that it was not a condition essential to the validity or operation of a resolution of disallowance that the regulations should first be laid before the House and notice of such resolution given.

On these authorities, I would hold that the provision for laying is merely directory and not mandatory and without the need to ascertain whether it had been laid, the relevant proclamation is therefore valid.

As regards learned counsel's contention that ss 47 and 57 of the Act falls under Part III and not Part II as has been prescribed in the relevant notification, this point had in fact been clarified by the Federal Court in the *Johnson Tan's* case[1] that this is due to the change in the numbering of the Parts effected by a revision of the Act in 1972. Part II in the proclamation should therefore read as Part III.

Concerning the car BCB 6896 in PW2's police report at the seventh line, there is no evidence to suggest that two cars of similar make with almost the same registration number had been involved and considering the correct car registration number in the third line of the same police report, the court holds that BCB 6896 is actually only a typewriting error of BCB 6096.

Finally, the release of the said car to the accused through his brother some two years after the offence does not in any way affect the prosecution's case as there is ample evidence to show that that was the car used in the commission of the offence and furthermore it was not the subject matter of the charges.

On these considerations, the court having earlier found that the prosecution had established a prima facie case against the accused, on the basis of the accused's prepared written statement, was of the opinion that his mere denial through this statement from the dock had not raised any doubt on the prosecution's case. His denial of knowledge of the firearms and ammunition, his explanation that the car door lock was faulty and could be opened from the outside, his allegation that he was in the habit of lending his car to his friends and his suggestion that this could be a frame up as he had business enemies, was to my mind purely a concoction calculated to pervert the course of justice in the light of the case for the prosecution.

In consequence, I found the accused guilty and convicted him on the two charges as amended as regards the date of the proclamation which should read 15 May 1969 instead of 15 March 1969. The accused had one previous conviction for theft in 1976 which he admitted but with or without this previous conviction the court had no other alternative as regards sentence after having found him guilty on both the charges but to sentence him to death.

Order accordingly.

Solicitors: *Paramjit & Co.*

Reported by *Prof Ahmad Ibrahim*

B-Trak Sdn Bhd v Bingkul Timber Agencies Sdn Bhd & Anor

HIGH COURT (KOTA KINABALU) – CIVIL SUIT NO K924 OF 1985
ABU MANSOR J
26 SEPTEMBER 1986

Civil Procedure – Application for summary judgment – Delay in making application – Effect – Triable issues – Rules of the High Court 1980, O 14

Contract – Illegality – Public policy – Agreements for lease of goods – Whether in fact and in law agreements for sale or hire-purchase – Tax avoidance – Whether illegal – Whether there was intention to mislead the Revenue – Whether agreements void – Damages – Need for proof – Contracts Act 1950, s 24(b) & (e)

Revenue Law – Tax avoidance – Whether illegal – Income Tax Act 1967, s 140

By a number of agreements in writing, the first defendant rented from the plaintiffs nine units of equipment. The second defendant had undertaken to guarantee the punctual payment by the first defendant of sums payable under the agreements. The first defendant paid only part of the rentals due and owing. The plaintiffs alleged that in breach of the terms of the agreement the first defendant had failed to keep the equipment in good order and repair and that as a consequence the first defendant was liable for the cost of repairs. The plaintiffs claimed that they were entitled to retake possession of the equipment and claimed against the defendants the total rent and all moneys payable under the agreements.

The plaintiffs brought an action against the defendants for their claim and applied for summary judgment under O 14 of the Rules of the High Court 1980. The defendants opposed the application on various grounds. The first ground was that the plaintiffs had delayed in making the application and that no reason had been advanced for the delay. Appearance was entered on 3 October 1985 and the defence was delivered on 18 October 1985. The application for summary judgment was filed on 12 December 1985. The defendants contended that the lease agreements were a subterfuge for sale and purchase agreements. They further contended that the lease agreements were illegal in that they were intended or meant to defeat the revenue laws of the country or alternatively that they were contrary to public policy. The defendants also said that even if the agreements were valid, the defendants would not be liable for the sum claimed but only for the actual damage or loss proved to have been caused by the breach of the agreements or in any other reasonable compensation which was not a penalty. The defendants said that the sums claimed constituted a penalty. They also said that the plaintiffs had failed to mitigate the loss and damage allegedly suffered by them.

Held, dismissing the application:

(1) The plaintiffs were not precluded from taking out an O 14 summons after the defence was filed but the onus of explaining the delay thereafter was on the plaintiffs and in this case the plaintiffs had not discharged the onus as they had not explained the delay.

(2) The defendants had succeeded in raising a triable issue capable of being resolved only by the calling of evidence at a proper trial as to whether the relevant agreements were leasing or hire-purchase agreements. The only place for the proper